APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 97-1859EM

CECILIA LACKS,

Appellee,

v.

FERGUSON REORGANIZED SCHOOL DISTRICT R-2,

Appellant.

On Appeal from the United States District Court
for the Eastern District of Missouri

Submitted: January 12, 1998

Filed: June 22, 1998

Before RICHARD S. ARNOLD,[1] Chief Judge, WOLLMAN and HANSEN, Circuit Judges.

RICHARD S. ARNOLD, Chief Judge.

In this case Ferguson-Florissant Reorganized School District ("the school board") appeals the District Court's grant of summary judgment in favor of the plaintiff, Cecilia Lacks, on Lacks's claim under Missouri law that her termination by the board was not supported by sub-

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[1] The Hon. Richard S. Arnold stepped down as Chief Judge of the United States Court of Appeals for the Eighth Circuit at the close of business on April 17, 1998. He has been succeeded by the Hon. Pasco M. Bowman II.

stantial evidence. The school board also appeals a jury verdict in favor of Lacks on First Amendment and race discrimination claims. We reverse and remand for the entry of judgment in favor of the defendant school district. We hold, among other things, that a school district does not violate the First Amendment when it disciplines a teacher for allowing students to use profanity repetitiously and egregiously in their written work.

I.

Cecilia Lacks began teaching at Berkeley Senior High School in the fall of 1992 after teaching at other schools in the same school district since 1972. Lacks taught English and journalism classes, and she sponsored the school newspaper. In October 1994, Lacks divided her junior English class into small groups and directed them to write short plays, which were to be performed for the other students in the class and videotaped. The plays written by the students contained profanity, including the repeated uses of the words "fuck," "shit," "ass," "bitch," and "nigger." When the plays were videotaped, these words were used more than 150 times in approximately forty minutes. Hearing Exhibits 12 and 13. Lacks later admitted that the plays contained an unusual amount of profanity, and one of her witnesses later described the use of profanity in the plays as "extreme," "disgusting," "upsetting," and "embarrassing." Hearing Tr. at 271, 277, 439. Lacks was aware of the content of the plays before they were performed, because she had previousy reviewed at least one of the scripts and had attended rehearsals of the plays the day before. Hearing Tr. at 437. On October 10, the students performed their plays and were videotaped at the direction of Lacks. Two other school district employees were also present during the videotaping of the plays: Donna Clark, a part-time teacher, and Mike Minks, an audio-visual technician. Clark and Minks eventually received letters of reprimand from the school administra-

tion for allowing the students to use profanity. Hearing Tr. at 167, 233.

The following January, as a result of complaints by one of Lacks's students, the existence of the videotapes came to the attention of Vernon Mitchell, the principal of Berkeley High School. Mitchell initiated an inquiry into the matter, and he and two school district administrators met with Lacks and her union representative twice over the next two weeks. During the investigation, the administrators learned that as part of a poetry-writing exercise, Lacks had permitted a student to read aloud in a classroom two of his poems which contained profanity and graphic descriptions of oral sex. Hearing Tr. at 386-88, 596-97.

Following the investigation, Dr. Robert Fritz, the district superintendent, formally charged Lacks with "willful or persistent violation of and failure to obey [the school district's] policies" under Mo. Ann. Stat. § 168.114 (1991 & Supp. 1998). Appellant's App. at 901. Fritz alleged that Lacks violated several school board policies and recommended her termination by the school board. Lacks requested a hearing, and the school board heard testimony from Lacks and fifteen other witnesses over five evenings in early March 1995. The school board also examined numerous exhibits and viewed the videotaped performance of the students' plays. At the hearing, the school board narrowed its earlier allegations to one charge: violation of board policy 3043, which requires teachers to enforce the section of the Student Discipline Code which prohibits profanity.[2] On March 23, the board issued a

[2] The Ferguson-Florissant Student Discipline Code prohibits two types of student behavior. Under the Student Discipline Code, Type I behavior includes serious misconduct, such as drug use, theft, or the use of firearms or explosives, which may result in student suspension or expulsion. Type II behavior includes behavior "that is disorderly or unacceptable but does not violate Type I standards . . . ." Under the Code, Type II behavior includes profanity and

decision which found that Lacks was aware of the school board's policy preventing profanity, that she could have chosen teaching methods which prohibited profanity, and that her failuure to do so constituted a "willful and persistent violati[on] of Board policy to a degree that cannot be . . . tolerated." Appellant's App. at 905. Based on its findings, the school board terminated Lacks's teaching contract.

In May 1995, Lacks brought suit in a Missouri state court, seeking judicial review of the school board's decision under Mo. Ann. Stat. § 168.120 (1991 & Supp. 1998). She also alleged that the school board violated her due process rights under the United States and Missouri Constitutions, violated her rights under the First Amendment and 42 U.S.C. § 1983 (1994), and discriminated against her on the basis of race in violation of Missouri law and Title VII of the federal Civil Rights Act. The school board removed the entire case to the District Court pursuant to 28 U.S.C. § 1441 (1994). The District Court granted the school board's motion to dismiss Lacks's due process claims for failure to state a claim upon which relief could be granted, but it denied the school board's motion to dismiss Lacks's First Amendment claim. The District Court also entered partial summary judgment in favor of Lacks on her claim for review of the school board's termination of her teaching contract. See *Lacks v. Ferguson Reorganized School District R-2*, 936 F. Supp. 676 (E.D. Mo. 1996). In its order, the District Court held that Lacks did not willfully violate board policy 3043, because she believed that profanity was permitted in the context of creative expression in the classroom.

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obscene gestures, and a student who engages in Type II behavior is subject to a verbal reprimand, loss of class or school privileges, special work assignments, change of class schedule, or temporary separation from peers. Appellant's App. at 250-51. There are no written exceptions under the Student Discipline Code which permit students to engage in Type II behavior.

Id. at 682-83. Accordingly, the District Court awarded Lacks reinstatement with back pay, attorneys' fees, and costs.

The parties proceeded to trial in November 1996 on Lacks's First Amendment and race discrimination claims. The school board moved for judgment as a matter of law at the close of Lacks's case and its own case, and the District Court denied the motion both times. The District Court submitted the case to the jury, which returned a verdict in favor of Lacks for $500,000 on the First Amendment claim and $250,000 on the race discrimination claim. The school board now appeals.

II.

We can easily dispose of the school board's argument that the District Court improperly allowed the board to remove the case because it lacked jurisdiction to review the school board's decision under the Missouri Administrative Procedure Act. In *City of Chicago v. International College of Surgeons,* 118 S. Ct. 523 (1997), the Supreme Court held that a federal district court properly exercised jurisdiction over a case containing claims for on-the-record review of local administrative findings as well as claims that a local administratitve action violated federal law. *Id.* at 530. The school board recognized in its brief, filed before the Supreme Court decided *City of Chicago v. International College of Surgeons,* that "[t]he case at bar is in a procedural posture identical to the case considered in *International College of Surgeons.*" Appellant's Br. at 15. Accordingly, we hold that the District Court properly allowed the school board to remove this case.

III.

A.

Under Missouri law, when a school board terminates a contract with a teacher under Mo. Ann. Stat. § 168.114,

including termination for the willful or persistent violation of a school board regulation, the teacher may appeal the school board's decision to a state circuit and seek judicial review of the school board's decision. The court must affirm the decision of the school board unless the decision (1) violates a constitutional provision; (2) is made in excess of statutory authority or jurisdiction; (3) is unsupported by "competent and substantial evidence upon the whole record"; (4) is made for any other reason unauthorized by law; (5) is made upon unlawful procedure or without a fair trial; (6) is arbitrary, capricious or unreasonable; or (7) involves an abuse of discretion. Mo. Ann. Stat. § 536.140 (1988 & Supp. 1998). This scope of review is limited. The reviewing court must affirm the school board if the board "reasonably could have reached the decision it did." *Hudson v. Wellston School District*, 796 S.W.2d 31, 33 (Mo. App. 1990). The court may not substitute its judgment of the evidence for that of the school board, and it must consider all evidence in the light most favorable to the decision of the board. *Id.* The determination of the credibility of the witnesses is a function of the school board, not the reviewing court. *Ortbals v. Special School District,* 762 S.W.2d 437, 439-40 (Mo. App. 1988) (citations omitted).

The District Court granted summary judgment in favor of Lacks because it found insufficient evidence in the record that Lacks "willfully or persistently" violated board policy 3043. *Lacks,* 936 F. Supp. at 680. The parties agree with the District Court that proof of "willful or persistent" violation is twofold: The school board must prove both an intent to act and an intent to violate or disobey a particular regulation. *Lacks,* 936 F. Supp. at 680 (citing *Ortbals,* 762 S.W.2d at 440). In other words, in order to prevail the school board must prove that Lacks violated the board policy prohibiting profanity, and that she knew that the board policy applied to the profanity used by her students. After a careful review of the

evidence, we hold that the record contains sufficient evidence for the school board to have concluded that Lacks willfully violated board policy.

Lacks admitted that she allowed students to use profanity in the classroom in the context of performing the plays they had written and reading aloud the poems they had composed. Hearing Tr. at 386-88. At the hearing, and in her brief, Lacks defended this practice by arguing that she thought that the board's policy on profanity applied only to "student behavior" and not to students' creative assignments. *Id.* at 484-86. She also argued that her teaching method, which she describes as the "student-centered method" and which she explained at length at the hearing, required her to allow her students creative freedom, which included the use of profanity. *Id.* at 372-78. Lacks could not say with certainty that she would be able to teach at Berkely High School if her students were not given the freedom to use profanity in their creative activities. *Id.* at 560-64. As evidence that Lacks believed that the anti-profanity policy did not apply to students' creative assignments, the District Court noted that testimony at the hearing indicated some confusion within the school district as to whether reading aloud literature which contained profanity might violate the school board's prohibition on profanity. *Lacks*, 936 F. Supp, 682. For example, Larilyn Lawrence, a curriculum coordinator for language arts at the school district, believed that a videotaped production of a play with students using profanity could fall within acceptable course parameters. Hearing Tr. at 840-43. On the other hand, Barbara Davis, the assistant superintendent for curriculum instruction, testified that teachers in the school district should not allow students to read aloud profanity contained in literary works. *Id.* at 792.

The school board also heard testimony from Lacks's principal, Vernon Mitchell, that he told Lacks that profanity was not permitted in the school newspaper. Mitchell

testified that he specifically spoke to Lacks in 1993 about profanity in the school newspaper, and told her that use of profanity in the newspaper was not allowed. Hearing Tr. at 172-73, 240. Mitchell said that he had reviewed a draft of the newspaper and was concerned that the students were including profanity in the paper by writing "S blank blank T" and "F blank blank K" rather than writing every letter of the profane words. *Id.* at 173, 234, 249. Mitchell testified that he discussed the use of profanity in the newspaper with Lacks "[t]wo or three times." *Id.* at 240. Mitchell also noted that signs posted in Lacks's classroom read "No Profanity." *Id.* at 250. When the board issued its opinion terminating Lack's contract, it based its decision in part on its finding that Lacks had been warned about the use of profanity by Mitchell. Appellants' App. at 904.

Lacks claimed that Mitchell never warned her about the use of profanity in the newspaper. Hearing Tr. at 413. However, under Missouri law, assessing the credibility of witnesses is the function of the school board, not the reviewing court. See *Ortbals*, 762 S.W.2d at 439-40. Because the school board heard testimony that Lacks was directly warned by the principal in her school that including "S blank blank T" and "F blank blank K" in the student newspaper violated the school board's profanity policy, the board could have reasonably found that Lacks knew that profanity was not allowed in students' creative activities. While Lacks did produce some evidence that confusion existed in the school district as to the profanity policy, and while she denied that she had been warned about it, we must read the record in the light most favorable to the school board's decision, together with all reasonable inferences. *Hudson v. Wellston School District*, 796 S.W.2d at 33.

The policy prohibiting profanity was explicit and contained no exceptions. It was not ambiguous. The board

was free to find that Mitchell gave Lacks an express and particularized direction about the student newspaper. We think it was not unreasonable for the board to treat student writing for the newspaper and student writing for the class as alike. Isolated instances of profanity had been overlooked or tolerated in the past, but what went on in Lacks' classroom went far beyond the reading aloud of a novel containing the occasional "damn." The board might have chosen a lesser form of discipline, especially in view of Lacks's long and devoted service. It was not required to do so by law. We hold that the board's decision was reasonable and supported by substantial evidence on the record as a whole. The judgment in the plaintiff's favor on this claim must be reversed.

B.

When the jury returned a verdict in favor of Lacks on her First Amendment claim, it provided answers to two interrogatories posed by the District Court's instructions. Under the District Court's instructions, answering "no" to either of the interrogatories allowed Lacks to prevail on the First Amendment claim. With respect to the first interrogatory—"Did [Lacks] have reasonable notice that allowing students to use profanity in their creative writing was prohibited?"—the jury answered "no." With respect to the second interrogatory—"Did defendant school district have a legitimate academic interest in prohibiting profanity by students in their creative writing, regardless of any other competing interests?"—the jury also answered "no." Appellant's App. at 341. The District Court subsequently entered judgment in favor of Lacks with respect to her First Amendment claim. We reverse and hold, as a matter of law, that the answer to both of those questions was "yes."

Lacks argued at trial and on appeal that she was acting as a facilitator for her students' speech, and that, under First Amendment law, she cannot be punished for not prohibiting her students' use of profanity unless she was

provided with reasonable notice that profanity was prohibited in students' creative exercises, and unless the prohibition on profanity in creative activity served a legitimate academic interest. At least one court has held that, under the First Amendment, a school district must provide a teacher with notice as to what types of expression are prohibited in a classroom before it holds the teacher responsible for failing to limit that type of expression. See *Ward v. Hickey*, 996 F.2d 448, 452 (1st Cir. 1993) (citing *Keyishian v. Board of Regents*, 385 U.S. 589 (1967)). We are satisfied that Lacks was provided with enough notice by the school board that profanity was not to be allowed in her classroom, whether in the context of a creative exercise or not. Lacks testified at trial that she understood that, under her contract with the school district, she was required to enforce the Student Discipline Code, and she testified that she was familiar with the rules and policies of the school board. Trial Tr. at 562-63. The Student Discipline Code clearly prohibits profanity and obscene gestures, and it contains no exception for creative activities. Appellant's App. at 251. Moreover, Lacks's principal, Vernon Mitchell, testified at trial, as he did at the school board hearing, that he informed Lacks that the use of profanity by the students was not permitted in the student newspaper, one form of creative activity. Mitchell told Lacks: "There is no way I would allow profanity in the newspaper." Trial Tr. at 1412.

In fact, Lacks received more notice than has been required in other cases. In *Bethel School District No. 403 v. Fraser*, 478 U.S. 675 (1986), a student was disciplined for using sexually suggestive language in a speech before a high school assembly. Before the student gave the speech, he told some of his teachers what he was going to say, and he was told that the speech was "inappropriate and that he probably should not deliver it" and that giving the speech could have "severe consequences." *Id.* at 678. The Court rejected the student's argument that his due process rights had been violated

because he had not received sufficient notice that a delivery of the speech would result in discipline: "Given the school's need to be able to impose disciplinary sanctions for a wide range of unanticipated conduct disuptive of the educational process, the school discriplinary rules need not be as detailed as a criminal code which imposes criminal sanctions." *Id.* at 686. In the present case, not only did Lacks admit that she was familiar with the school district's disciplinary rules and understood her obligation to enforce them, her principal also testified that he told her that the rules applied to one form of student creative activity. Therefore, as a matter of law, Lacks had sufficient notice that under the board's rules, she was not to permit profanity in her clasroom. Perhaps the jury did not believe the principal's testimony about the warning he gave Lacks. Even so, the policy against profanity was explicit. Lacks well knew what the plays were like before she allowed the students to perform them. In acting as she did, she took the risk that the board would enforce the policy as written. Under the circumstances, the notice given was fair and constitutionally sufficient.

We also hold, as a matter of law, that the school board had a legitimate academic interest in prohibiting profanity by students in their creative writing. The Supreme Court has written that public education " 'must inculcate the habits and manner of civility as values in themselves conducive to happiness and as indispensable to the practice of self-government in the community and the nation.' " *Fraser,* 478 U.S. at 681 (quoting C. Beard & M. Beard, *New Basic History of the United States,* 228 (1968)). While students in public schools do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate," *Tinker v. Des Moines Independent Community School District,* 393 U.S. 503, 506 (1969), students' First Amendment rights "in schools and classrooms must be balanced against the society's countervailing interest in teaching students the boundaries of socially appropriate behavior." *Fraser,* 478 U.S. at 681. Accord-

ingly, the Supreme Court has held that "educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns." *Hazelwood School District v. Kuhlmeier,* 484 U.S. 260, 273 (1988).

A flat prohibition on profanity in the clasroom is reasonably related to the legitimate pedagogical concern of promoting generally acceptable social standards. The Supreme Court has told us that "schools must teach by example the shared values of a civilized social order." *Fraser,* 478 U.S. at 683. The school board itself, in its opinion terminating Lacks's employment with the school district, wrote that the purpose of the board's disciplinary policies is "to establish, to foster, and to reflect the norms and standards of the community it serves." Appellant's App. at 903. Allowing one student to call another a "fucking bitch" and a "whore" in front of the rest of the class, and allowing a student to read aloud a poem that describes sexual encounters in the most graphic detail, as the students did in Lacks's classroom, hardly promotes these shared social standards. We consider the matter too plain for argument.

As a matter of law, the school board had the right to establish and require the enforcement of a rule which prohibits classroom profanity in any context, and it provided Lacks with enough notice of its disciplinary policies. Therefore, the judgment in the plaintiff's favor on her First Amendment claim is reversed.

C.

At trial, Lacks set out to prove her race discrimination case by "direct" evidence of discrimination under *Price Waterhouse v. Hopkins,* 490 U.S. 228 (1989), rather than the indirect, burden-shifting method of *McDonnell Douglas Corp. v. Green,* 411 U.S. 792 (1973). See Appellee's Br. at 51-52. The jury found that Lacks had proved by a preponderance of the evidence that race was

a motivating factor in the school board's decision to terminate her, and that the school board did not prove by a preponderance of the evidence that it would have discharged Lacks regardless of her race. We reverse, and hold as a matter of law that race was not a motivating factor in the school board's decision to terminate Lacks. In reaching that conclusion, we are mindful that the evidence must be viewed in the light most favorable to the jury's verdict, and that all *reasonable* inferences in support of the verdict must be allowed.

Lacks points to a statement made by Vernon Mitchell, her principal and supervisor. Mitchell admitted that when he saw the videotape with the students performing their plays, his reaction was that it was "black students acting a fool and white folks videotaping it." Trial Tr. at 1392. Lacks also elicited testimony from another teacher at Berkeley High School that in the past Mitchell had displayed signs of hostility toward white teachers at Berkeley because Mitchell believed that some white teachers did not care about the students. *Id.* at 1316. And Lacks produced some evidence which arguably showed that Dr. John Wright, an assistant superintendent for personnel, viewed the videotaping incident in racial terms. *Id.* at 1656. Lacks is white; Mitchell, Wright, and the students are black.

However, Mitchell and Wright did not make the decision to terminate Lacks; that decision was made by the school board. Trial Tr. at 1906-07, 2013. Lacks responds to this problem by arguing that the school board was influenced by the bias of the administrators, and that the board consequently served as the conduit, or "cat's paw," of the racial animus of the school administration. See *Kientzy v. McDonnell Douglas Corp.*, 990 F.2d 1051, 1057-58 (8th Cir. 1993); *Shager v. Upjohn Co.*, 913 F.2d 398, 405 (7th Cir. 1990). But Lacks produced no evidence that the school board deferred to the opinion or judgment of Mitchell or Wright in making its determination. At the board's hearing, neither Mitchell nor Wright

recommended that the board terminate Lacks. Trial Tr. at 1418, 1907. Patrick Boyle, a school board member, testified that no members of the administration were present during the board's deliberations, and that no administrator suggested to the board what the decision should be. *Id.* at 2013-14. Boyle said that all board members agreed that Lacks had violated school policy, and that most of the deliberations centered on the level of discipline she should receive. *Id.* at 2012. Michael Hirsch, another school board member, testified that during its deliberations, the school board never discussed any alleged racial discrimination against Lacks by school administrators. *Id.* at 1905. Hirsch said, "We sat and we reviewed the evidence; talked about the evidence; how it related to board policy. We listened to the arguments and discussed the arguments on both sides" *Id.* at 1906. The evidence in this case unequivocally shows that the board made an independent determination as to whether Lacks should be terminated and did not serve merely as a conduit for the desires of school administrators. Lacks's "cat's paw" theory must therefore fail.

Lacks offers one piece of evidence which allegedly shows direct racial bias on the part of the school board: a four-page press release issued by the board after it terminated Lacks's teaching contract. The press release reads in part:

> Teachers set the tone and direction for class assignments and projects, and all classroom activities should be able to stand the test of public scrutiny. The video produced in Ms. Lacks' class demonstrates a serious and extreme lack of direction from the teacher. Teachers do not have the right to abdicate their responsibility to set standards under the guise of creativity. The content of the video is a violation of our black community; it is a violation of our white community; it is a violation of the values within our community and it is a violation of the ethical teaching standards practiced by all educational professionals. Most importantly, it is a viola-

> tion of the students in the class. It assumes that all students in the class operate from the standard of behavior portrayed on the video. That assumption is wrong, and it is what led to the student complaints that brought the video to the administration's attention.

Appellant's App. at 1008-09. Lacks argues that the references to "white community" and "black community" provide direct evidence that the board "had race on its mind" when it fired Lacks. Appellee's Br. at 59. That proposition is questionable, especially given that Leslie Hogshead, the president of the school board, who signed the statement, testified that she did not believe the Lacks's case involved racial issues. Trial Tr. at 1496. Moreover, having race on one's mind is not the same thing as acting because of race. At any rate, the single reference in the school board's press release is not sufficient to sustain the jury verdict on the race discrimination claims. Because Lacks has produced insufficient evidence that the school board's decision to terminate her was motivated by race, the judgment in Lacks's favor on her race discrimination claims cannot stand. On this record, the inference that the school board acted because of Lacks's race is wholly unreasonable. In our view, the extreme nature of the language used and the exhaustive hearing given Lacks by the board leave no room for anyone reasonably to conclude that Lacks was disciplined because of her race.

The judgment of the District Court is reversed, and the cause remanded with directions to dismiss the complaint with prejudice.

It is so ordered.

A true copy.

Attest:

Clerk, U.S. Court of Appeals, Eighth Circuit.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 97-1859EMSL

CECILIA LACKS,

Appellee,

vs.

FERGUSON REORGANIZED SCHOOL DISTRICT R-2,

Appellant.

Order Denying Petition for Rehearing and Suggestion for Rehearing En Banc

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Filed: September 17, 1998

The suggestion for rehearing en banc is denied. Judge MacMillan and Judge Morris Sheppard Arnold would grant the suggestion. The petition for rehearing by the panel is also denied.

McMILLIAN, Circuit Judge, dissenting.

I dissent from the court's denial of the petition for rehearing en banc. I believe that consideration by the full court is necessary to maintain uniformity of our decisions and, more importantly, because this case involves issues of exceptional importance. *See* Fed. R. App. P. 35(a).

This case is not about whether students should or should not be permitted to use profanity in their creative writing

assignments or anywhere else in school; indeed, I have no quarrel with a school policy that clearly and strictly prohibits students from using profanity in all school-related activities. Nor is there any question that Lacks allowed some of her students to use profanity in their creative writing assignments "repetitiously and egregiously," as the panel states. *Lacks v. Ferguson Reorganized Sch. Dist. R-2*, 147 F.3d 718, 719 (8th Cir. 1998) (*Lacks*). The issue in this case, however, concerns the constitutionality of terminating a public high school teacher—one who had been teaching for over twenty years—for allowing students to use profanity in their creative writing assignments, where that teacher was not on notice that the school's profanity policy, as stated in the Student Discipline Code, was meant to cover student creative writing assignments.

The factual question of whether Lacks was notified that the school policy prohibiting profanity covered student creative writing assignments was submitted to the jury in an interrogatory. The interrogatory asked: "Did [Lacks] have reasonable notice that allowing students to use profanity in their creative writing was prohibited?" *Id.* at 723. The jury answered "no." *Id.* That factual finding by the jury must be reviewed by this court under a "highly deferential standard." *Crittenden v. Tri-State Thermo King, Inc.*, 108 F.3d 165, 166 (8th Cir. 1997). More specifically, in reviewing the jury's finding that Lacks did not receive reasonable notice of the applicability of the school policy, this court must "resolve all conflicts in favor of [Lacks], giving [her] the benefit of all reasonable inferences and assuming as true all facts supporting [Lacks] which the evidence tended to prove." *Id.*; *see also Becker v. United States*, 968 F.2d 691, 694 (8th Cir. 1992) ("Our standard for review of a jury finding is a deferential one: we must affirm the jury's verdict 'if, viewing the evidence in the light most favorable to appellees, reasonable persons could differ as to the proper conclusion.' ") (citing *Rademaker v. Nebraska*, 906 F.2d 1309, 1311 (8th Cir. 1990)).

The panel in this case failed to follow our well-established standard of review. The panel reversed the jury's factual finding that Lacks was not given reasonable notice of the applicability of the profanity policy by simply declaring, "as a matter of law," that the answer to the interogatory "was 'yes.'" *Lacks* 147 F.3d at 723. In the interest of maintaining uniformity of our decisions, the panel opinion should be vacated. A jury finding is no less entitled to deference because it leads to an unpopular result. Moreover, the panel opinion's underlying reasoning is flawed for several reasons.

First, the panel opinion cites the fact that Lacks stated at trial that she knew she was required to enforce the Student Discipline Code and that she was familiar with the written rules and policies of the school board. *Id.* Lacks's statement, viewed in isolation, certainly favors the school district's position, but it is only a small portion of Lacks's trial testimony. Lacks was on the witness stand for more than two days during the two-week trial. She provided ample testimony from which it could be inferred that she was not reasonably notified that allowing students to use profanity in their creative writing assignments was prohibited, notwithstanding her knowledge of her duty to enforce the Student Discipline Code and her familiarity with the school board's written rules and policies. The assessment of Lacks's credibility was a function of the jury, not the court of appeals. *See Greaser v. State of Missouri, Dep't of Corrections*, 145 F.3d 979, 983 (8th Cir. 1998) noting that determination of witness credibility is "task for the jury to perform") (citing *Manatt v. Union Pac. R.R. Co.*, 122 F.3d 514, 1518 (8th Cir. 1997) ("it was up to the jury to assess [the witness's] credibility"), *cert. denied*, 118 S. Ct. 697 (1998)).

Lacks also introduced anecdotal evidence at trial which showed that the use of profanity in student creative works had previously been allowed by the school without punish-

ment to the supervising teacher or the students involved. For example, during the trial testimony of school principal Vernon Mitchell, Lack's counsel questioned him about a play entitled "How You Living," which was written and performed by Berkeley High School students under the supervision of a teacher named Sharita Kyles. Mitchell admitted that this play was performed one evening in the school auditorium, that it was open to the community, and that he was in the audience during the performance. Portions of a videotape of that production were shown to the jury during Mitchell's testimony. While watching the videotape, Mitchell conceded that the play had profanity and other inappropriate content. For example, he admitted that there were lines such as: "I tried to keep her back but she was pulling on my thing"; "I'll blow your damn head off"; and "Man, damn leave me the hell alone." In light of these admissions, Lacks's attorney asked Mitchell if he had seen a student play containing profanity before he testified at Lacks's school board hearing. Mitchell answered "yes." He also admitted that when the play was over, he thanked the students and Sharita Kyles for the production and, thereafter, did not take any action against Kyles for violating the Student Discipline Code. Trial transcript (Vol. VII) at 1373-1386.

While the "How You Living" play was performed at Berkeley High School around 1992, shortly before Lacks began teaching there, the evidence certainly supports the conclusion that teachers at the school were not reasonably on notice that they would be punished if a student were to write or perform a play containing profanity. Moreover, while it is abundantly clear that the profanity in Lacks's students' works was worse than the profanity in the play "How You Living," that is not the issue; the issue is whether or not the jury reasonably could have concluded that "[Lacks] [did not] have reasonable notice that allowing students to use profanity in their creative

writing was prohibited," based on the evidence introduced at trial viewed in the light most favorable to Lacks.

The panel opinion also relies on the fact that Mitchell testified at trial that he informed Lacks that the use of profanity by the students was not permitted in the student newspaper, one area of student creative writing. The panel opinion states: "Lacks's principal, Vernon Mitchell, testified at trial, as he did at the school board hearing, that he informed Lacks that the use of profanity by the students was not permitted in the student newspaper, one form of creative activity. Mitchell told Lacks: 'There is no way I would allow profanity in the newspaper.'[1]" *Lacks*, 147 F.3d at 723 (citing Trial transcript at 1412).

Notably, in reversing the district court's summary judgment disposition of Lacks's separate state law claim, which challenged the school board's decision, the panel opined:

> Because the school board heard testimony that Lacks was directly warned by the principal in her school that including "S blank blank T" and "F blank blank K" in the student newspaper violated the school board's profanity policy, the board could have reasonably found that Lacks knew that profanity was not allowed in students' creative activities. While Lacks did produce some evidence that confusion existed in the school district as to the profanity policy, and while she denied that she had been warned about it, we must read the record in the light most favorable to the school board's decision, together with all reasonable inferences.[2]

Id. at 722.

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1 Actually, the quote attributed to Mitchell in the panel opinion is a statement that was made by *Lacks to Mitchell*, not vice versa, during a transcribed meeting that took place on January 25, 1995. *See* Trial transcript (Vol. VII) at 1411-1412.

2 Notably, while the panel opinion omits any mention of the deferential standard of review that the court of appeals was re-

It can equally be said that, while the jury heard testimony that Lacks was directly warned by Mitchell that profanity in the *student newspaper* violated the school board's profanity policy, the jury reasonably could have found that Lacks was not given reasonable notice that profanity in *student creative writing assignments* violated the policy. A school newspaper is not the same as classroom creative writing assignments. Because Mitchell's warning addressed a *publication* which held itself out as a *newspaper* and was identified with the *school as a whole*, the jury reasonably could have concluded that Lacks reasonably assumed that Mitchell's position vis-a-vis the student newspaper was not based upon the Student Discipline Code. Thus, the mere fact that Mitchell instructed Lacks not to allow students to use profanity in the student newspaper does not prove, "as a matter of law," that Lacks had sufficient notice that profanity was prohibited in her classroom creative writing assignments. *See id.* at 723-24.

Finally, the panel opinion reasons:

> The Student Discipline Code clearly prohibits profanity and obscene gestures, and it contains no exception for creative activities.
>
> . . . .
>
> [*T*]*he policy against profanity was explicit.* Lacks well knew what the plays were like before she allowed the students to perform them. In acting as she did,

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quired to apply in reversing the jury's factual finding on Lacks's First Amendment claim, the panel opinion clearly describes the virtually identical standard of review that the district court was required to apply in setting aside the school board's decision. *See Lacks v. Ferguson Reorganized Sch. Dist. R-2*, 147 F.3d 718, 721 (8th Cir. 1998) ("The court may not substitute its judgment of the evidence for that of the school board, and it must consider all evidence in the light most favorable to the decision of the board. The determination of credibility of the witnesses is a function of the school board, not the reviewing court.") (citations omitted).

> she took the risk that the board would enforce the policy as written.

Id. (emphasis added). By this, the panel could mean only one thing, given the context—that the policy "as written" was "explicit" in prohibiting the use of profanity *in creative writing assignments.* I disagree.

School board policy 3043 requires teachers to enforce the Student Discipline Code, which in turn prohibits profanity and obscene gestures, among numerous other forms of "prohibited behavior." *Id.* at 720 & n.2. Nowhere does the policy explicitly state that profanity is prohibited in student creative works, and nowhere does it state that creative writing assignments qualify as "behavior." In other words, the policy was not *explicit* with respect to classroom creative writing assignments. Moreover, the jury reasonably could have concluded, under the circumstances of this case, that a teacher could reasonably assume that the language a student used in a creative writing assignment was not considered "behavior" governed by the Student Discipline Code, particularly in light of evidence that profanity in other student creative works—including one student-written play—was apparently condoned. In other words, the jury reasonably could have concluded that it also was not *implicit* in the Student Discipline Code that the profanity prohibition applied to creative writing assignments. That reasonable inference by the jury could not be overturned by the court of appeals under our highly deferential standard of review. *See Crittenden v. Tri-State Thermo King, Inc.*, 108 F.3d at 166.

I also believe that en banc review is justified in this case because it involves issues of exceptional importance. The panel highlights the fact that offensive and profane words were used more than 150 times in approximately forty minutes of the student-written plays. The panel also points to the fact that "as part of a poetry-writing exercise, Lacks had permitted a student to read aloud in a classroom two of his poems which contained profanity and graphic de-

scription of oral sex." *Id.* at 720 (citing [School Board] Hearing tr. at 386-88, 596-97). Of course, when these facts are viewed in isolation, one might wonder how suppressing or censoring such profanity could raise any First Amendment or educational issues of exceptional importance. Again, these facts, standing alone, present only a one-sided, fractional portion of the evidence. The jury was presented with a much bigger picture. For example, Lacks testified at length about the two poems mentioned above and the context in which they were read to the class. Her testimony revealed that these two poems—vulgar and shocking as they were—were the first utterances in the class by a boy named Reginald, who previously had refused to participate in class and had repeatedly been sent to the principal's office because he did nothing but put his head on his desk during class. While Lacks does not deny that she allowed Reginald to read those two poems aloud in class, she also testified that no one was aware of their content before he read them. Trial transcript (Vol. II) at 369. More importantly, however, she explained, that, after he wrote and read aloud those two poems, Reginald went on to write several more for her class, the last of which, entitled "Alone," won academic awards. These facts were entirely ignored in the panel opinion (as they apparently were ignored by the school board).

Lacks's trial testimony regarding Reginald's story is set forth below. I urge that this part of the record be fully and thoughtfully considered.

> Q. I would like to show you, Cissy, what's been marked as Exhibit 18, and ask if you can identify this document?
>
> A. Yes.
>
> Q. What is it?
>
> A. This document is a series of poems that I showed to the administrators in my District that was

done by one of my students, Reginald McNeary, when he was in ninth grade.

Q. And when was that?

A. That was in 1992.[3]

Q. At the Berkeley High School?

A. Yes.

Q. And these poems were done in which class?

A. These poems were done in the ninth grade English class.

Q. What do they illustrate, Cissy?

. . . .

A. They illustrate how a student can grow in a very short period of time using the student-centered teaching method. They illustrate that a student can learn a lot of techniques in a very short time if he or she cares about what he is doing, and they show that what a student says in the beginning is not at all the way a student might want to express him or herself, but it's what they start with because they may not have had the experience to do or say anything else.

Q. And you said you showed these poems to your administrators?

A. Yes.

Q. When did you do that?

A. I did that in a meeting that I had with them on January 25th.

Q. 1995?

A. 1995.

Q. And that was after you were suspended?

A. Correct.

Q. All right, can you start with the first poem on the top there and explain to us the significance of

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[3] It is worth noting that the events involving Reginald occurred three years before the events concerning the student plays, which led to the school board's termination of Lacks.

this poem in that learning process that you just described?

A. This poem that I'm going to read is the last poem that Reginald wrote.

Q. The last poem he wrote in what period of time?

A. In three weeks.

Q. This was a three-week poetry unit?

A. Yes.

Q. In ninth grade English?

A. Yes.

Q. First of all tell us the story of Reginald. When he came into your class, what did you observe about him?

A. Reginald came into my class and he wanted to do absolutely nothing but put his head on his desk in the back of the room. He did not talk to anyone. He did not talk to me. He wouldn't do assignments. I would send him to the guidance office, he would throw away the sheets of paper. I would send him to the principal, I would get a note back saying that I should send him during my class but he wouldn't go. I continued to send—nothing worked for Reginald. He was totally silent, toally disengaged, totally disconnected from me, from school, and he also, I learned later, because I asked about him, had had a very difficult—

MR. SUSMAN: Objection, hearsay.

THE COURT: That will be sustained.

Q. Did Reginald have any observable problems in learning, to your knowledge?

A. Yes.

Q. What were they?

A. He seemed to have a very difficult time talking to people or looking at them. I saw him write some-

thing once and he seemed to have an eye hand co-ordination problem in terms of writing.

Q. All right, did he later stop putting his head down in the class?

A. Yes.

Q. About when did that occur?

A. When we started doing the poetry writing.

Q. How did you organize physically the classroom when you began the poetry writing?

A. The class was in a circle so we could talk to each other and share work.

Q. And did Reginald sit in the circle?

A. No.

Q. Where did he sit?

A. He sat in the back of the room with his head on his desk.

Q. What did the other students do?

A. They told me that if they had to sit in the circle, Reginald would have to sit in the circle, I should force Reginald into the circle.

Q. What did you tell them?

A. I told them there is no way I could force Reginald in the circle short of picking up the desk, but that they could get him in the circle by doing things so interesting to him that he would be jealous and come into the circle.

Q. Did that happen?

A. It did.

Q. How soon after did it happen?

A. Two days after we started doing things in poetry, he started moving into the circle.

Q. Okay, and this first poem that is listed on Exhibit 18 was written you say about three weeks after he moved into the circle?

A. Yes.

Q. Okay, would you read it for us, please?

A. Sure. It's called "Alone."

I'm all alone in this world today.
No one to laugh with, no one to play.
It's been like that since the age of three.
No one to love care or hold me.
I guess that's why I'm the way I am.
No one loved me so I don't give a damn.
No one to pick me up when I fall.
No one to measure growth or how tall.
Alone, how it hurts inside.
If I were to die, no one would cry.
I never gave a damn about any other.
I love my shoes more than I love my mother.
You might think I'm the devil or call me Satan.
I have no love, I'm so full of hating.
I guess that's why I have low self-esteem.
The only time I show love is in my dreams.

. . . .

Q. Let me ask you Cissy, did this poem win any awards?

A. This poem, a somewhat corrected one won awards. This poem won the first place in the poetry contest at Berkely High School, and then I believe it also won the district-wide poetry contest in a corrected version.

Q. Corrected in what way?

A. Corrected in the grammar, and corrected a bit in the way the stanzas are organized.

Q. Did Reginald agree to enter the poem in the contest?

A. Yes.

Q. Did he read this poem in class?

A. Yes.

Q. And you said you videotaped it?

A. Yes.

Q. Why did you do that?

A. At the end of the poetry unit when people have decided what they wanted to share with people, in this particular instance for poetry, we agree to tape them and then use them again in other classes, so each year they can see what students did the year before.

Q. Okay, and then can you explain to us the process that you went through with Reginald to get him to this award-winning poem?

A. Well, Reginald heard the things that we were talking about in terms of writing, and the first exercise I believe that he saw, a tape of Quincey Troupe talking about poetry writing, and Reginald wrote a poetry exercise for us when we were reading out loud in the class, and he asked if he could read it out loud. It was the first time Reginald said anything in the class to any of us.

Q. Okay, would you like to show us what he did at that point?

A. Uh-huh.

Q. At the beginning?

A. I'm sorry, what do you mean, show it? Are you going to put it up?

Q. First of all, Exhibit 18, could you turn to the first poems that you just mentioned?

A. Okay. There is a poem called Hard Core Gangsta Pimp.

Q. And the second poem?

A. It's called Click.

Q. Let's see if I can get that. This Hard Core Gangsta Pimp poem?

A. Uh-huh.

Q. Is that the first poem he wrote in poetry class?

A. Yes.

Q. And would you agree there is a great deal of street language in there?

A. Yes.

Q. Profanity?

A. Yes.

Q. The second poem as well, the second poem called Click, the name of this poem is Click?

A. Uh-huh.

Q. Same thing?

A. Yeah.

Q. How did this poem come to be read to the class?

A. When we were doing the poetry exercises, we're just experimenting and nobody knows what anybody else has written, but when asked if they would like to share it, Reginald said that he would like to share what he had written.

Q. So he stood up and read it?

A. Yes.

Q. What did you say to him after he read these poems to the class?

A. Well, I was a little taken aback because it was also read with a lot of anger, and I told him in the class that I thought that his writing had a lot of anger in it and that sometimes you can use anger to write extremely effective poems, and that he should listen to what we were doing in the rest of the classes when we talk about technique and process, and see if he could use some of that technique to express his anger in other ways.

Q. You did not criticize him for the street language in here?

A. No.

Q. Why not?

A. I would have—I was so pleased that Reginald did something, that he made an effort to talk, it was the first time he shared anything with anybody and did anything at all in the class, I was not going to shut him down, I was going to take that and work with it. It was something, finally I had something

that he had done that I could work with, and the class could see him somewhat as part of the class and begin to respond to him. I thought it was a good moment in teaching.

Q. Did he write any poems immediately after those two?

A. Yes.

Q. Can you tell us what the next poem was in the series?

A. The next poem was called "Hate."

Q. When did he write Hate in relation to those first poems?

A. I think probably about a week and a half later.

Q. Okay?

A. Week later.

Q. Could you read "Hate" for us?

A. There is so much hate in the world today.
Some whites hate blacks and some Germans hate Jews.
But they are wrong because no one can choose.
How dark or bright or fat or light people are to be.
If it was up to me I would love all my brothers, white, Jews or any other.
For Christmas instead of begging for jewelry, instead I'm going to pray for peace.

Q. Did you see any progress then between those first poems and this one?

A. Yeah, Reginald was beginning to use all techniques and styles we had talked about. He had opened up. He was beginning to talk about the feelings that he had, but in a way, I think, that he thought other people would listen to him and that was what he now thought was effective poetry.

Q. Did he write any other poem in that three week period of time?

A. Yes.

Q. What was the next poem he wrote?

A. He wrote a poem called "Why."

Q. And is there a date on this poem?

A. December 8th, 1992.

Q. Could you read "Why" for us?

A. Why.

Why do they stare at me when I'm [maxin']?
Is it 'cus I'm not the color that they are [axin'].
They whisper in silence.
I guess they think I'll cuss.
Violence, why, why couldn't God make us one color
Instead of black and white, and many others.
Why, why when you look at me you look in fear
When I have never beat you up or made you shed a tear.
Why can't we all just get along living in harmony.
Is that too wrong?
My sisters are labeled hooker and whore bang-in'
And they have got my brothers dope and gangbanging'.
Why are my people living in poverty and the rich don't care how they be?
Now I know this is the worst poetry you [ever heard]
but it comes from the heart.
I wrote every word.

Q. Did you see any progress here?

A. I saw incredible progress. He is starting to use a certain style now and a rhythm to his writing, and it's real clear that he also has a position and he wants other people to know what it is and when he read it he told us what this poem came from.

Q. And then the last poem in the serious was the "alone" poem you read to us.

A. The last poem was the "Alone" poem.

Q. And how would you evaluate "Alone" as a piece of poetry?

A. I think that the person who wrote this poem is not a student poet but a poet. I think he is like Langston Hughes. He has an incredible way with words, and it makes people cry, in class, or just be so moved by what he is saying the doing, it's, you know, it's really amazing as a poem.

Q. Who chose his poem to win the district-wide poetry contest?

A. I'm not sure. I didn't. There were judges in the District who did.

Q. And by the way, the poem "Alone" which won the districtwide poetry contest, does that have any street language in it?

A. Yes, it does.

Q. I never gave a damn about any other?

A. Uh-huh, twice.

Q. Considerably less than that what Reginald included in his first two poems, would you agree?

A. Yes.

Q. And how do you explain that progress?

A. Well, to me I see it all the time, that once a student opens up and starts expressing himself or herself and then learns the process or the techniques and they hear people listening to them, they just want to begin to change what they are doing, so it's quite,

it just seems to me it is a quite natural learning process. It's part of the student-centered method.

Q. You also talked to us about peer critique, and I'm interested to know how did the class respond to Reginald's first two poems?

. . . .

Q. Did the class respond to Reginald's first two poems?

A. The class as I recall was taken aback. They just listened, but at the same time said, "Reginald, good, you talked," that's what I remember. "Reginald, you said something."

Q. Okay, and how did they react to the poem "Alone"?

A. They actually cheered and clapped for him when he read it.

. . . .

Q. Okay. You told us earlier that you took these poems to the administrators to explain to them your teaching process in January of '95 after you had been suspended. Did you take all the poems to them?

A. Yes.

Q. Did you explain to them as you explained to us today the teaching process?

A. Yes.

Q. Who did you explain this to?

A. I explained it to John Wright, Vernon Mitchell and Barbara Davis.

Q. Now, you went to the Board termination hearing regarding your termination, is that correct?

A. Yes.

Q. And the District included a couple of Reginald's poems in its evidence against you, didn't it?

A. Yes.

Q. How did they come to have these poems?

A. I brought them all five of these poems, that's how they came to have them.

> Q. Did the administrators show the Board Reginald's award-winning poem?
>
> A. No.
>
> Q. What did you think about that?
>
> A. I was so discouraged, I didn't even know what teaching was about any more. They showed the first two poems that Reginald wrote and didn't show anything else, somehow seemed to have lost or forgotten all the other poems. Very discouraging for a teacher and also for the student who had written the poems.

Id. at 360-76.

The school district now argues that "[p]etitions for rehearing or hearing en banc should not be granted when the resolution of a case affects only the parties immediate to the action." Response to Suggestion for Rehearing En Banc at 1 (citing *Schwieger v. Iowa Beef Processors, Inc.*, 816 F.2d 1217, 1219 (8th Cir. 1987)). The outcome of this appeal does not affect only the parties to this action. It affects all innovative and well-meaning teachers like Lacks and students in need like Reginald. When good educators are scared away or driven from our schools because they cannot trust the system to treat them honestly and fairly, we are all affected, most especially our children. As the Supreme Court declared over thirty years ago,

> [o]ur Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom. "The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools." The classroom is peculiarly the "marketplace of ideas." . . . ". . . No one should underestimate the vital role in a democracy that is played by those who guide and train our youth."

> We emphasize once again that "[p]recision of regulation must be the touchstone in an area so closely touching our most precious freedoms;" . . . "[f]or standard of permissible statutory vagueness are strict in the area of free expession. * * * Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity." . . . When one must guess what conduct or utterance may lose him his position, one necessarily will 'steer far wider of the unlawful zone * * * ." . . . For the "[t]hreat of sanctions may deter * * * almost as potently as the actual application of sanctions." . . . The danger of that chilling effect upon the exercise of vital First Amendment rights must be guarded against by sensitive tools which clearly inform teachers what is being proscribed.

Keyishian v. Board of Regents, 385 U.S. 589, 603-04 (1967) (citations omitted).

As I indicated at the outset, I am not condoning the use of profanity in our schools or every aspect of Lacks's teaching methodology. But the jury found in this case, based upon *all* the evidence and their assessments of credibility, that Lacks was not given reasonable notice that profanity was prohibited in her creative writing assignments. If she had been given such notice, this whole matter could have been avoided. In this day and age, while our children are being exposed to the worst aspects of society through the media, entertainment, and sometimes even in their own homes, we expect public school teachers to erase the effects of that environment and make even the most uninspired children learn and achieve. Meanwhile, we require our teachers to pick their way through a mine field of competing and conflicting expectations, and changing and elusive legal standards. This case stands for the proposition that, for all her hard work and devotion to *all* her students, this teacher was in the end fired

for stepping on a political land mine—one which she never even knew was there. This case was wrongly decided. I vote to grant the petition for rehearing en banc.

A true copy.

Attest:

U.S. Court of Appeals, Eighth Circuit.

APPENDIX C

UNITED STATES DISTRICT COURT
E.D. MISSOURI

No. 4:95CV1024 CDP

CECILIA LACKS,

Plaintiff,

v.

FERGUSON REORGANIZED SCHOOL DISTRICT, R-2,

Defendant.

Aug. 15, 1996

MEMORANDUM AND ORDER

PERRY, District Judge.

This matter is before the Court on Count I of plaintiff's complaint, which seeks judicial review of the school board's March 23, 1995 decision to terminate plaintiff's indefinite teaching contract. Also before the Court is defendant's motion for partial summary judgment as to Count III of plaintiff's first amended complaint.

Defendant Ferguson Reorganized School District, R-2 ("the district") terminated plaintiff Cecilia Lacks from her position as a tenured school teacher because she allowed her students to use profanity in the poems and plays they wrote for her English class, which defendant found violated a district rule prohibiting student profanity. In her first amended complaint, plaintiff seeks judicial

review of the school board's termination decision under Missouri law, Mo.Rev.Stat. §168.120 (Count I), alleges that defendant violated the Due Process Clause (Count II) and First Amendment (Count III) to both the United States and Missouri constitutions, and alleges that defendant discriminated against her based on race under both federal and Missouri law (Counts IV and V). By order dated March 14, 1996, this Court dismissed plaintiff's due process claims (Count II), and pursuant to that order also dismissd the two individual defendants. Therefore, the sole remaining defendant is the district. In its March 14, 1996 order, the Court also denied defendant's motion to dismiss plaintiff's First Amendment claims. The remaining claims in this case, other than plaintiff's request for judicial review of the board's decision, are set for jury trial on November 4, 1996.

I. Factual Background

Plaintiff Lacks had an indefinite teaching contract with defendant school district, where she had taught since 1972. Plaintiff had been teaching at Berkeley Senior High School since 1992. During the 1994-95 school year (until she was terminated in March of 1995), plaintiff taught English and journalism at Berkeley. In addition, as part of her journalism class, plaintiff sponsored the school newspaper, which had not been published for several years before she revived it in 1993.

Plaintiff selected a curriculum for her English class in the fall of 1994 that included viewing, reading and writing drama. From September 28 to October 10, 1994, the students worked on a drama writing assignment in which the class was divided into six small groups, and each group had to write and perform a short play. On or about October 10, 1994, the students performed their plays and were videotaped by a district employee. The plays written and performed by the students contained extensive profanity, including frequent use by the students of the words "nig-

ger," "fuck," "bitch," "ass," and "shit." Plaintiff had reviewed the students' scripts before the plays were produced, and also viewed the videotapes of the plays with the students in class. Plaintiff did not encourage or discourage the use of profanity by her students in the drama assignment or any other creative-writing assignment, nor did she generally discuss the use of profanity in the plays or other creative works with her students after the fact.

Plaintiff's contract for employment, which she signed prior to the 1994-95 school year, stated that she "had received and read the rules and regulations and the statement of policies of the Board of Education . . ." The district's 1994-95 policies and procedures contained a student discipline policy (board policy number 3043) that incorporated the "student discipline code" ("the code"). The code prohibits certain student behavior, both Type I (more severe) and Type II (less severe). Under the code, "Type II Behavior includes . . . profanity . . . and any other inappropriate behavior as defined by school officials." At all relevant times, plaintiff's classroom contained signs that prohibited profanity. Outside of class-related creative activities, plaintiff did not tolerate the use of profanity or other disruptions by her students.

Plaintiff did not censor student profanity in the students' plays and poems because of her teaching approach, referred to as the "student-centered method," in which teachers do not censor the creative expressions of their students so that the students can find their own voice and have that voice accepted as is before it is ultimately refined. The student-centered method used by plaintiff is nationally accepted and plaintiff herself was successful with the method. During her career, plaintiff was praised by administrators and teachers inside and outside of the district for her succes as a teacher. There are alternative methods of teaching creative writing that do not allow students to use profanity and that are successful. Plaintiff is familiar with some of these methods and has briefly experi-

mented with them, but has never used them for an entire semester.

On or about January 10, 1995, Vernon Mitchell, principal at Berkeley, learned about the videotapes of the plays performed by plainntiff's students in October 1994. Mitchell, along with Barbara Davis, the district's Assistant Superintendent of Curriculum Instruction, and Dr. John Wright, the district's Assistant Superintendent for Personnel, immediately viewed some of the plays. Plaintiff met with the administration on January 25, 1995, and explained her method of teaching in general and the drama assignment in particular.

On January 27, 1995, Dr. Robert Fritz, the district's Superintendent of Schools, formally charged plaintiff with willful or persistent violation of the published regulations of the Board of Education. Dr. Fritz alleged that plaintiff had violated numerous board policies and recommended that the board terminate plaintiff's indefinite teaching contract. Plaintiff made a timely request for a hearing by the school board, and a hearing was held on March 1, 2, 6, 7 and 9, 1995. At the hearing, defendant narrowed its charges to one: violation of board policy 3043 prohibiting student profanity. Defendant relied on the videotapes of the six plays and on two poems written by one of plaintiff's students, each of which contained extensive profanity. On March 23, 1995, the school board issued its Findings of Fact and Conclusions of Law, signed by Board President Leslie S. Hogshead, by which it terminated plaintiff's indefinite teaching contract effective that same day. The Board concluded that the plays and poems contained "extreme profanity" and that plaintiff's "conduct relative to [those plays and poems] and to similarly permitted and admitted prior teaching assignments of Teacher violated Board policy 3043, in a willful or persistent manner."

II. Judicial Review of Board Decision (Count I)

A. Standard of Judicial Review

Under Missouri law, the board of education of a school district can terminate an indefinite contract with a permanent teacher for six statutory reasons, including willful or persistent violation of a board regulation. Mo.Rev.Stat. § 168.114(1). Terminated teachers can appeal the decision of the board to the circuit court of the county where the employing district is located, and such appeals "shall be heard as provided in chapter 536, RSMo." *Id.* § 168.120. Under chapter 536, which governs administrative procedure and review, courts may overturn a school board's decision if the decision:

> (1) Is in violation of constitutional provisions;
>
> (2) Is in excess of the statutory authority or jurisdiction of the agency;
>
> (3) Is unsupported by competent and substantial evidence upon the whole record;
>
> (4) Is, for any other reason, unauthorized by law;
>
> (5) Is made upon unlawful procedure or without a fair trial;
>
> (6) Is arbitrary, capricious or unreasonable;
>
> (7) Involves an abuse of discretion.

Id. § 536.140(2). Plaintiff filed a timely appeal of the board's decision with the Circuit Court of St. Louis County, and defendant removed the case to this court. The Court has supplemental jurisdiction over this state-law claim under 28 U.S.C. § 1367, and must apply Missouri law in reviewing the board's decision. See, e.g., *Carrington v. Mahan*, 51 F.3d 106, 107 (8th Cir. 1995).

Plaintiff challenges the school board's decision to terminate her contract on four grounds: (1) the evidence does not support the board's finding of plaintiff's willful and

persistent violation of board policy 3043 because the policy does not apply to creative works and because there is no evidence of willfulness or persistence; (2) the board's decision was arbitrary, capricious and unreasonable in that the board failed to follow its own policies governing academic freedom and student publications; (3) the board's decision is unauthorized by law and made pursuant to unlawful procedures in that defendant has attempted to disguise an incompetency allegation as a violation of board policy, and defendant did not follow the heightened procedural requirements of a termination for incompetency; and (4) plaintiff did not receive a fair hearing under Missouri law because defendant did not allow her to depose two individuals and did not allow all of her witnesses to testify at the hearing. Because the board's decision that plaintiff "willfully or persistently" violated board policy 3043 is unsupported by competent and substantial evidence upon the whole record, the decision of the board will be reversed and the Court will not examine plaintiff's alternative arguments.

B. Discussion

In its decision, the board stated that plaintiff was terminated because "[t]he Board has clearly established a prohibition of profanity by students in policy number 3043; this is the policy under which Teacher has been charged and which Teacher has willfully or persistently violated." Missouri law allows school districts to terminate the contracts of tenured teachers based on "[w]illful or persistent violation of, or failure to obey, the . . . published regulations of the board of education of the school district employing [her]." Mo.Rev.Stat. § 168.114(1)(4). In reviewing the evidence as to whether plaintiff's actions were willful or persistent, this Court must afford appropriate weight to the board's evidentiary findings:

> [T]he evidence must be considered in the light most favorable to the board's decision, together with all

> reasonable inferences where supported. If evidence before an administrative body would warrant either of two opposed findings, the reviewing court is bound by the administrative determination and it is irrelevant that there is evidence to support a contrary finding. Finally, the determination of the credibility of witnesses is a function of the administrative tribunal.

Hudson v. Wellston Sch. Dist., 796 S.W.2d 31, 33 (Mo. Ct.App.1990) (citations omitted).

Several Missouri courts have addressed the meaning of "willful" and "persistent" as used in § 168.114(1)(4). The Supreme Court of Missouri has stated:

> "Willful" has been defined as "done deliberately; not accidental or without purpose; intentional" and "persistent" as "continuing in a course of action without regard to opposition."

Board of Educ., Mt. Vernon Schools v. Shank, 542 S.W. 2d 779, 782 (Mo.1976) (en banc). Other Missouri courts have examined the degree of intent required under § 168.114(1)(4):

> Is it enough . . . that the offender intends to act, and the action taken happens to be inconsistent with a regulation, or must he or she act with the intention of violating or failing to obey a regulation? The first of these interpretations merely involves one intention, viz. to act in the absence of reflex or coercion; the second involves two intentions, viz. one to act and one to violate or disobey. We believe the latter interpretation provides the meaning intended by the legislature.

Carter County Sch. Dist., R-1 v. Palmer, 582 S.W.2d 347, 349 (Mo.Ct.App.1979); *see also Burgess v. Ferguson Reorganized Sch. Dist., R-2*, 820 S.W.2d 651, 656 (Mo. Ct.App.1991). Therefore, to support a finding that a

teacher violated § 168.114(4), Missouri courts require school districts to establish (1) an intent to act And (2) an intent to violate or disobey a particular regulation. *Ortbals v. Special Sch. Dist. of St. Louis County*, 762 S.W.2d 437, 440 (Mo.Ct.App.1988).

In this case, defendant established the "intent to act" element because plaintiff admitted that she does not censor profanity in her students' creative works. The issue, therefore, is whether plaintiff had an "intent to violate or disobey a particular regulation," i.e., board policy 3043. The board made no specific finding as to plaintiff's intent to violate policy 3043, but presumed such intent because plaintiff was aware that policy 3043 incorporated the student discipline code that prohibited student profanity. Plaintiff argues, however, that she did not know that policy 3043 applied to profanity in class-related creative assignments. Defendant argues that there is no exception for class-related profanity on the face of policy 3043. Defendant also argues that plaintiff had been put on notice that the policy applied to creative works by Principal Mitchell's warnings to plaintiff regarding profanity in the student newspaper. Plaintiff denies having received any warnings about profanity in the newspaper.

The record as a whole clearly indicates that there was in practice an unwritten exception in the district for profanity in class-related activities. The evidence presented to the board was overwhelming that many administrators and teachers in the district allowed class-related profanity depending on the context and degree of profanity. The relevant evidence can be summarized as follows:

- In the 1993/94 school year, plaintiff showed Mitchell a student journal entry containing the words "honkey" and "chink." and the statement if "I ever see a white are [sic] a Jew touch me I'm going two kill them . . ." and Mitchell did not discuss the language with plaintiff or the student, nor did

he discipline either plaintiff or the student. (Tr. 202).

- A play written and performed by Berkeley students for the entire student body and attended by Mitchell contained profanity, including at least the word "damn," as well as other conduct classified as Type II violations of policy 3043. (Tr. 209-12). Neither the teacher supervising that play nor the students performing it were disciplined in any way. (Tr. 214-16).
- Dr. John Wright, assistant superintendent, testified regarding the plays produced in plaintiff's class that "if [the students] were not doing this in a play, they would have been suspended, it would have been Type I or Type II behavior in the classroom." (Tr. 116).
- Wright testified that he did not know whether a student who reads profanity aloud from another author's work could be punished. (Tr. 100).
- Karen Price, Chair of the English Department at Berkeley, testified that she was not aware of a rule that required teachers to censor profanity in creative works. (Tr. 813). Price also testified that she was not aware that a student reading profanity from literature could be charged with violating the student discipline code. (Tr. 823).
- Dr. Larilyn Lawrence, the district's Curriculum Coordinator for Language Arts, testified that she did not know of a policy prohibiting students from reading profanity in literature aloud. (Tr. 845).
- Delores Graham, principal at a middle school in the district, was not aware that a student reading profanity from a creative work of literature or that student's teacher would be violating the student discipline code. (Tr. 892).

- James Nicholson, a playwright who visited plaintiff's classes, testified that he was present when district administrators heard students read profanity from their own creative works, but no administrator ever told him or plaintiff to disallow profanity in the students' creative expression. Nicholson testified that no policy was "verbalized to me or given to me in print." (Tr. 318).

- C.S., a former student of plaintiff, testified as follows: "I didn't realize that expressing yourself in a play when, you know, I didn't realize if you express yourself, you could get in trouble for that. But I realize that if you are using profanity and doing other things in the hallway or any place else in the school, that you could get in trouble." (Tr. 852).

- P.S., a former student of plaintiff, testified that she performed creative writing assignments containing profanity in the presence of a district administrator and the administrator "didn't give a reaction, so we just basically, we went with the flow." (Tr. 510).

Defendant submitted no evidence indicating that the district in fact enforced policy 3043 to prohibit students from reading aloud or otherwise using profanity in creative works.[1] The only evidence that a district employee in-

[1] Defendant attempts to characterize Mitchell's alleged warnings to plaintiff about profanity in the student newspaper as evidence that plaintiff knew profanity was not allowed in any student creative works. Defendant's attempt is unconvincing because there is a separate board policy (number 2053) entitled "student publications" that requires teachers and students to judge the "appropriateness" of materials and to edit "obscene" and other material from the student newspaper and yearbook. Mitchell's enforcement of this specific policy does not translate to an interpretation that profanity is not allowed in student poems and plays under policy 3043, which governs student behavior. In fact, policy 2053 begins with the following statement: "The Board recognizes creative stu-

terpreted policy 3043 as defendant has interpreted it even after plaintiff's termination was the testimony of Barbara Davis, assistant superintendent. Davis testified that it would not be acceptable for a student to read aloud from a book or play that contained profanity, and that such behavior by a student "could be" a violation of the student discipline code. (Tr. 785-87). Further, when asked how teachers were to know that having student read profanity in creative works aloud could get them terminated, Davis testified that "teachers use judgment on that." (Tr. 791-92). When asked whether teachers in the district know they can be terminated for reading a play with profanity aloud in their classroom, Davis responded "I'm sure they do now." (Tr. 797). Davis' interpretation of policy 3043, which contradicts evidence from every other administrator or teacher who testified at the hearing, is not sufficient to prove that plaintiff or anyone else actually knew that policy 3043 prohibited extreme profanity by students in creative works.

Rather, as the foregoing evidence demonstrates, there was no agreement or understanding within the district regarding how the use of profanity by students both in reading literature aloud and in the students' own creative expressions would be treated under the student discipline code.[2] Davis said reading aloud literature containing profanity could violate the code; Lawrence, Price and Graham said that it would not. Students did not know that reading profanity—whether profanity written by other authors or

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dent expression as an educational benefit of the school experience. One medium of expression is student journalism." The policy proceeds to expressly limit the content of student journalism, but does not address limitations on any other form of creative student expression.

[2] Although the Court notes that plaintiff was not charged with allowing students to read other authors' works aloud, it is relevant to the fact that the district drew lines in practice that were not expressly drawn in policy 3043.

by students—could lead to discipline, and students did in fact read profanity aloud in front of administrators of the district and were not disciplined. The students who performed the plays in plaintiff's class were not disciplined, according to one administrator, specifically because the profanities were part of a play. Price and Lawrence, who were called on by the administration to offer written statements regarding the videotapes, testified that they did not believe that a teacher who allows profanity in creative writing violates the student discipline code.

C. Conclusion

The board has apparently attempted to draw the line at the extreme use of student profanity. In the "Conclusions of Law" section of the board's decision, the board states that "District Exhibits 10, 11, 12 and 13 contain extreme profanity." (Emphasis added). In addition, the board stated in the "Conclusions of Law" section that "Teacher's conduct within the District was an isolated, willful and persistent practice violative of Board policy to a degree that cannot be, will not be and otherwise has not been tolerated." (Emphasis added). On the other hand, neither teacher nor student were punished for the statement "I'll blow your damn head off" in a student play, for using racial and ethnic slurs in a student journal, or for a student's use of the word "damn" in a prize-winning poem.

It may be the board's desire to draw lines with respect to student profanity, and the Court agrees that the board has the authority to establish and interpret its own policies. *State ex rel. City of Springfield v. Public Serv. Comm'n*, 812 S.W.2d 827, 833 (Mo.Ct.App.1991). However, the board never drew these lines in board policy 3043, until it chose to terminate plaintiff for violating the policy. On its face, policy 3043—contained in the student behavioral code—prohibits student profanity and other disruptive behavior. On its face the policy refers to student behavior, not to a student's performance of a play, or to a student's reading aloud another's writing, or

to a student's own written work produced as part of a class assignment. The evidence overwhelmingly shows that in practice, student profanity in creative expression was allowed to a certain degree. The board could only have concluded that plaintiff intended to violate policy 3043 if it concluded that plaintiff knew that the policy prohibited student use of profanity in creative works. This conclusion that plaintiff (or anyone else in the district) interpreted policy 3043 as the board has interpreted it—to allow some profanity but not extreme profanity in creative works—is simply not supported by the evidence presented to the board. Accordingly, defendant did not establish that plaintiff "willfully or persistently" violated board policy 3043. For that reason, the board's decision must be reversed.

D. Relief

Missouri law provides that, if a court finds for the teacher on appeal, the teacher "shall be restored to permanent teacher status and shall receive compensation for the period during which he may have been suspended from work, and such other relief as may be granted by the court." Mo.Rev.Stat. § 168.120(4). In addition to the statutory relief, plaintiff also seeks attorneys' fees and costs, and expungement of any reference to her termination from plaintiff's record. As required by Missouri law, the Court will order defendant immediately to reinstate plaintiff to her position as a teacher with an indefinite teaching contract and to compensate plaintiff from the date she was suspended by the district through the date of her reinstatement. Mo.Rev.Stat. § 168.120(4). In addition, the Court finds it appropriate to order defendant to expunge all references to plaintiff's termination and to these proceedings from plaintiff's personnel file. Finally, the Court will award plaintiff reasonable attorney's fees and costs related only to her appeal of the board's decision, i.e., Count I of plaintiff's complaint.

II. Collateral Estoppel

During this litigation, the parties have raised the issue of collateral estoppel (also known as issue preclusion) with respect to the effect of the board's decision on plaintiff's remaining legal claims for relief, which are set for jury trial in November 1996. The Missouri law of issue preclusion governs this case. *Simmons v. O'Brien*, 77 F.3d 1093, 1096 (8th Cir.1996). Under Missouri law, courts consider the following factors to determine whether collateral estoppel applies: (1) is the issue in the present case identical to the issue decided in the prior adjudication; (2) was there a judgment on the merits in the prior adjudication; (3) is the party against whom collateral estoppel asserted the same party or in privity with a party in the prior adjudication; and (4) did the party against whom collateral estoppel is asserted have a full and fair opportunity to litigate the issue prior to suit. *King General Contractors, Inc. v. Reorganized Church of Jesus Christ of Latter Day Saints*, 821 S.W.2d 495, 500 (Mo. 1991) (en banc).

Because there is no longer a prior "judgment on the merits" under the second factor, collateral estoppel does not apply in this case: "When an appellate court vacates a judgment, the lower court's judgment cannot be considered a final judgment on the merits for purposes of collateral estoppel." *State v. Nunley*, 923 S.W.2d 911, 922 (Mo.1996) (en banc). In this order, the Court reverses the decision of the school board; therefore, there is no final judgment on the merits for purposes of collateral estoppel. Furthermore, with respect to the timing of this Court's ruling on Count I, the Court notes that *Lytle v. Household Mfg., Inc.*, 494 U.S. 545 (1990), holding that a district court should not make factual determinations that are common to equitable and legal claims before the legal claims are heard by a jury, does not apply in this case because the Court did not make any factual determinations in ruling on Count I of plaintiff's

complaint. Rather, the Court held only that the board's decision was not supported by competent evidence. Accordingly, collateral estoppel does not apply in this case and the jury deciding plaintiff's remaining claims will not be bound by any prior decision in this case, either by the school board or by this Court.

III. Motion for Summary Judgment (Count III)

Defendant filed a motion for partial summary judgment on Count III of plaintiff's complaint, in which plaintiff alleges that defendant violated her rights under the First Amendment. In its motion, defendant essentially argues that the Supreme Court has concluded, as a matter of law, that schools can prohibit profanity. Plaintiff argues that there is no per se rule allowing schools to prohibit any and all profanity; rather, the Court must apply the "legitimate pedagogical concerns" test in this case.

The Court disagrees with defendant's contention that the Supreme Court has concluded that schools can prohibit profanity regardless of the circumstances. The two most relevant Supreme Court cases upholding a school's right to prohibit profanity, *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988) and *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675 (1986), are distinguishable from the present case. In Hazelwood, the Court upheld the school's right to prohibit profanity in a student newspaper. In Bethel, the Court upheld the school's right to discipline a student for making a lewd and offensive speech in front of 600 students in the context of a fellow student's campaign for an elected class office.

First, these cases are distinguishable from the present case because they both involved public dissemination of profanity. The Court in *Bethel* noted: "Surely it is a highly appropriate function of public school education to prohibit the use of vulgar and offensive terms in public discourse." *Bethel*, 478 U.S. at 683. In the present case, the evidence shows that the student profanity al-

lowed by plaintiff was for in-class educational purposes only, and was specifically not to be disseminated outside of the classroom. Second, the Supreme Court cases are distinguishable from this case in that neither *Hazelwood* nor *Bethel* involved a teacher asserting her right to allow profanity that allegedly has a constructive educational purpose. The teacher's allegations in this case require a balance of the school's interest and the teacher's interest. Although the Court recognizes that schools have broad authority to prohibit student profanity, *Hazelwood* and *Bethel* do not require this Court to hold, as a matter of law, that defendant can prohibit profanity in its schools regardless of the context.

Rather, *Hazelwood* contains the appropriate legal standard to apply in this case: Was defendant's termination of plaintiff reasonably related to legitimate pedagogical concerns? *Hazelwood*, 484 U.S. at 273. Application of this legal standard will inherently require the appropriate balance of the school's interest in prohibiting profanity and the teacher's interest in using the teaching method at issue in this case. In applying the "pedagogical concerns" test, it is appropriate to consider "among other things, the age and sophistication of the students, the relationship between teaching method and valid educational objective, and the context and manner of the presentation." *Silano v. Sag Harbor Union Free Sch. Dist. Bd.*, 42 F.3d 719, 723 (2d Cir.1994), *cert. denied*, 115 S.Ct. 2612 (1995).

At trial, defendant must establish its pedagogical concerns relating to the prohibition of this particular profanity, and must also establish that the termination of plaintiff was an action reasonably related to these concerns. On the other hand, plaintiff must show that her termination was not reasonably related to legitimate pedagogical concerns. On all of these issues, many factual disputes remain. For example, the parties disagree as to the effectiveness of plaintiff's teaching method and as to the effectiveness of other teaching methods that do not

allow profanity. Therefore, because genuine issues of material fact remain, defendant's motion for partial summary judgment on plaintiff's First Amendment claims will be denied. There is a sub-element of plaintiff's First Amendment claim: whether defendant afforded plaintiff appropriate notice under the First Amendment that her actions were prohibited. In its order denying defendant's motion to dismiss on this issue, the Court noted that two Supreme Court cases contained potentially conflicting standards with respect to notice. The Court now agrees with defendant and is convinced that the First Circuit has articulated the appropriate standard with respect to the notice required in the context of the First Amendment rights of high school teachers:

> Indeed, this circuit has long recognized a teacher's right to notice of what classroom conduct is prohibited. Of course, while we acknowledge a First Amendment right of public school teachers to know what conduct is proscribed, we do not hold that a school must expressly prohibit every imaginable inappropriate conduct by teachers. The relevant inquiry is: based on existing regulations, policies, discussions, and other forms of communication between school administrators and teachers, was it reasonable for the school to expect the teacher to know that her conduct was prohibited?

Ward v. Hickey, 996 F.2d 448, 453-54 (1st Cir.1993) (citations omitted) (emphasis added). Under the foregoing standard, the Court has no doubt that several factual disputes remain in this case. For example, the parties dispute whether Mitchell warned plaintiff about profanity in the student newspaper, and if he did, what effect those warnings had on plaintiff's understanding of board policy 3043 and its application to non-newspaper, class-related creative expression. These factual disputes preclude summary judgment, and defendant's motion for partial sum-

mary judgment as to the notice aspect of plaintiff's First Amendment claim will be denied.

Accordingly,

IT IS HEREBY ORDERED that, pursuant to plaintiff's request under Missouri law for judicial review of the school board's March 23, 1995 decision, the decision of the school board is reversed.

IT IS FURTHER ORDERED that defendant shall reinstate plaintiff to her position as a teacher with an indefinite teaching contract and shall compensate plaintiff from the date she was suspended by the district through the date of her reinstatement as required by Mo.Rev.Stat. § 168.120(4).

IT IS FURTHER ORDERED that defendant expunge all references to plaintiff's termination and to these proceedings from plaintiff's personnel file.

IT IS FURTHER ORDERED that plaintiff is awarded reasonable attorney's fees and costs related only to her appeal of the board's decision, i.e., Count I of plaintiff's complaint.

IT IS FURTHER ORDERED that defendant's motion for partial summary judgment [# 46] on Count III (First Amendment) of plaintiff's complaint is denied.

A Partial Judgment in accord with this order is entered this date.